75-1152

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1976

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Respondent,

- against -

DOMINICK SEMINARA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT RIVERS
Member of the Bar
of the United States
Supreme Court
Attorney for
Petitioner
287 Post Avenue
Westbury, N.Y. 11590
(516) 333-3555

HON. DAVID G. TRAGER
United States Attorney
225 Cadman Plaza East
Brooklyn, N.Y.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

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- against -

DOMINICK SEMINARA,

Petitioner.

PETITION FOR A WRIT
OF CERTIORARI

Petitioner, DOMINICK SEMINARA, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals, for the Second Circuit decided and entered the 7th day of January, 1976, which affirmed the judgment of conviction rendered against the Petitioner in the

United States District Court for the Eastern District of New York on the 19th day of September, 1975. Said Petitioner was convicted for a violation of Sections 1341 and 1342, Title 18, United States Code, Mail Fraud.

OPINION BELOW

The Order appealed from, of the United States Court of Appeals, Second Circuit, is reprinted herein as Appendix A.

The judgment of the United States District Court is reprinted herein as Appendix B.

JURISDICTION

The Order of the United States Court of Appeals was entered January 7, 1976.

The jurisdiction of this Court is invoked, made and conferred under 18 U.S.C. 1341, 1342 and Rule 19 and 22(2) of the Rules of the Supreme Court of the United States, and Amendment V, U.S. Constitution.

As hereinbefore described, the Order sought to be reviewed is dated and entered January 7, 1976.

OUESTIONS PRESENTED

I. Were the provisions of 18 U.S.C. 1341 and 1342 adhered to in this case, in respect to the statutory requirement that the United States Attorney prove the element of "intent"in order to constitute mail fraud.

II. Was there sufficient evidence underlying the charge under the mail fraud statute, where there was no proof that Petitioner intended to violate Section 1341 and 1342.

III. What constitutes "intent" within the meaning of the mail fraud statute Sections 1341 and 1342.

IV. Whether conviction of the defendant in a State court on charges stemming from the exact set of circumstances and from the same transaction, render a later Federal Prosecution a violation of the Double Jeopardy Clause of the United States Constitution, Amendment V.

V. In the event this petition is granted, the petitioner reserves the right to argue four further questions of importance to petitioner.

i.e., 1. Whether Sections 1341 and 1342 of Title 18, U.S.C. requires the government to establish a defendant's guilt to each and every individual count of the indictment.

2. Whether under these sections and the Federal Rules of Civil Procedure, a denial of a motion for discovery constitutes prejudicial error and thus violates the defendant's constitutional right to a fair trial.

3. What constitutes admissible evidence for the purpose of establishing "mailing" as a requisite element of the crime of mail fraud.

4. Whether the defendant was given his constitutional right to a fair trial where the lower court judge has so far departed from the accepted and usual course of judicial rulings and proceedings during the course of trial, and the Court of Appeals has, by its affirmance approved of such conduct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V

> "....nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law...."

Statutes

Title 18, United States Code, Sections 1341 and 1342

Section 1341

> "....whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both."

Section 1342

> "Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in Section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years or both."

Rule 22(2) of Rules of the Supreme Court of the United States

> "A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it is filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days...."

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

1. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's descretion, indicate the character of reasons which will be considered:

b. Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

New York State Penal Law
Sections 155.05 and 170.10

Section 155.05

> "A person steals property and commits larcency when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or witholds such property from an owner thereof."

Section 170.10

> "A person is guilty of forgery in the second degree when with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed,"
>
> "1. A ... commercial instrument, or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status ..."

STATEMENT OF THE CASE

Historical Background

In July, 1972, Petitioner, together with STEPHEN LENT, MICHAEL LENT and NICHOLAS MASCARA, formed a corporation known as FOTO FACTORY, INC. for the purpose of servicing the public, through mail orders, in the sale of film, processing and development. Petitioner and STEPHEN LENT were placed in charge of the advertising program by the corporation. Petitioner and the aforementioned persons were the officers and Directors of the corporation.

The bulk of the business of FOTO FACTORY, INC. revolved around mail orders. Through advertising, FOTO FACTORY, INC. offered for sale to the public, at extremely low prices, a "mailer" which contained film and self-addressed envelope for use by the purchaser to return the film to FOTO FACTORY, INC. for develop-

ment, after pictures had been taken.

As this phase of the business of FOTO FACTORY, INC. developed, many purchasers of "mailers" would use their credit cards, such as Master Charge and Bank Americard to pay for the purchase price. This was done by notifying FOTO FACTORY, INC. of the purchasers' credit card number. A slip charging the card holder would be prepared and presented to one of the banks that honored that particular credit card. As in the past, the bank deposited the amount of the purchase price to the account of FOTO FACTORY, INC. and the funds were transferred to FOTO FACTORY's account with Franklin National Bank.

It was decided, in order to generate profits to the company, that a merchandising campaign would be sponsored by FOTO FACTORY. This merchandising campaign sponsored by FOTO FACTORY was an offer of a "mailer" that had a value of $22.00 but was offered to the public at a low price of $9.95. While the margin profit to FOTO FACTORY was extremely small, it was expected that a large volume of sales would generate a substantial profit.

As part of this merchandising campaign, it was decided to offer the low priced "mailer" first to former credit card customers. This was done by first shipping the "mailers" to previous credit card customers and informing them that they had "A MONEY BACK GUARANTEE." After the "mailers" were shipped, a charge slip was prepared on the credit card holder's number and presented to a bank that honored that credit card. As in the past, the bank deposited the amount of the purchase price to the account of FOTO FACTORY, INC. and from time to time the

funds were transferred to FOTO FACTORY's account with the Franklin National Bank.

By the end of September, 1973, it became obvious to Petitioner that there had been a serious miscalculation of judgment. Customers chosen were not those which were originally specified. A substantial number of persons who had received the "mailers" objected to having their credit cards charged with the $9.95 purchase price. These people notified Master Charge or Bank Americard that they would not accept the charge to their credit cards. In turn, the particular bank would then charge back the amount to FOTO FACTORY's account.

When the complaints reached substantial numbers and there were insufficient funds in FOTO FACTORY's account with the bank to meet the charge back, the banks began to express concern. Unfortunately, payments to meet pressing obligations had reduced the balance in the Franklin National Bank account to a few dollars. While this problem was developing, FOTO FACTORY was experiencing difficulties with the Office of the Attorney General of the State of New York and well as the District Attorney's Office of Nassau County and the Consumer Affairs Department of Nassau County.

At this time, with the assistance of one MR. KRACS of the National Bank of North America, letters went out to customers advising them that a mistake had been made and that in accordance with the "money back guarantee" they should return the "mailers" delivered to them if they did not want a charge to their credit card. While there were a substantial number of complaints, the vast majority of those who had received "mailers" were taking advantage of the offer by sending back film for development. But the very success of the promotion was creating additional problems because of the need to purchase large quantities of chemical developer and paper.

In the midst of all the financial

difficulties, the creditor obtained default judgment against FOTO FACTORY, INC. and through the Office of the Sheriff of Nassau County sought levy and execution. In November, 1973, the Sheriff of Nassau County seized the property of FOTO FACTORY, INC. and closed down its offices and laboratory. Consequently, Petitioner and his partners filed a voluntary petition in bankruptcy.

Despite the bankruptcy, in order to meet the obligation of processing those films of customers who had accepted the charge for the "mailer," Petitioner sought permission from the Bankruptcy Court to continue the operation of FOTO FACTORY, INC. Referee RUDIN approved Petitioner's application.

Petitioner and his partner, MICHAEL LENT, deposited $12,000.00 to meet the cost of developing and processing, Petitioner's share of $6,000.00 having been borrowed from his family. With the shutdown of FOTO FACTORY, INC. the United States Post Office Department had stopped delivery of all mail addressed to them and approximately 52 sacks of mail were stored at the Rockville Centre Post Office. Referee RUDIN directed that 15 sacks of mail be released to FOTO FACTORY and the company immediately commenced the processing and development of the film. Simultaneously, the corporation made arrangements with FOTOCHROME, INC., a Florida firm also engaged in film processing and developing, to process the balance of customers film. FOTOCHROME, INC. agreed to do this work at no charge in order to maintain good industry relations with the public.

The Post Office Department and the Office of the Attorney General of the State of New York opposed the application made by the company to continue the processing of

those customers who had accepted the "mailers" and thereafter because of the opposition, the Referee in bankruptcy refused to permit the release of any more mail sacks. Consequently, there were more charge backs on credit cards.

As a result of the foregoing, Petitioner was indicted under the Mail Fraud Statute, Title 18, Sections 1341 and 1342. The indictment contained fifty (50) counts.

In addition, Petitioner was charged by the State of New York as a result of the same set of facts and circumstances with grand larceny in the second degree and forgery in the second degree.

In the United States District Court evidence of the history of the FOTO FACTORY's "mailer" campaign was submitted. This evidence clearly showed Petitioner had no "intent" to defraud its customers. The evidence at trial further showed that Petitioner and the FOTO FACTORY, INC. made "good faith" effort to rectify the problem caused by this bad business judgment. Those customers who did not accept the merchandise obtained refunds from the company. The Petitioner's good faith effort to continue the processing of the films of those customers who had accepted the "mailers" were frustrated when the postal authorities seized the sacks of mail.

Under Section 1341, Title 18, U.S.C. "good faith" is a defense to mail fraud. As noted in HARRISON v U.S., 200 F 662, 670 (6th Cir. 1912).

> "The promise to refund the purchaser's money if made in good faith and taken in connection with the literature here used could leave no room for the conclusion that the scheme upon the whole was one of defraud.

The government failed to show Petitioner had any "intent" to defraud, an essential element of the crime of mail fraud, or that Petitioner contemplated any harm to the public (customers). The evidence showed the value of the film processing was $22.00, but sold to the public as a result of the company's campaign at a low cost of $9.95.

On the eve of trial, Petitioner's counsel, ROBERT RIVERS, was apprised by the government it had a cabinet of documentation received from the Nassau County District Attorney's Office, as a result of its prosecution of Petitioner under the State statute, pursuant to the same facts and circumstances, stemming from the exact "transactions," subject of the Federal prosecution. Before trial commenced, Petitioner's counsel requested an adjournment of the case in order that he might discover certain materials which were essential to the defense case. One of these materials being a letter written by the defendant explaining to the Federal Trade Commission the actions he had taken with regard to customers. This letter was in the sole and exclusive custody of the prosecution. The information contained in the said letter, together with other testimony before the Attorney General and Consumer Affairs Department was very crucial to defendant's innocence or guilt. The Court denied the motion for adjournment and discovery. (See pages 36 through 44 of the trial transcript reprinted herein as Appendix E.)

Consequently, Petitioner was compelled to proceed to trial denying the Petitioner due process of law and the fundamental right of a fair trial.

Petitioner was forced to defend himself, first in the Nassau County State Court, then in the United States District Court, as a result of the exact facts and circumstances, stemming from the same "transactions," in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

At the trial in the United States District Court, the District Court allowed the government to admit in evidence,

copies of envelopes allegedly used to mail out the films to customers, without proof of the originals, or that such originals existed. The copies were illegible in some cases, yet these were used to convict the Petitioner on all fifty counts of the indictment, without any other testimony to show that these were the envelopes used or received by customers. Before their admission into evidence, the following objection was raised by defense counsel and overruled by the Court (pages 477 through 480 of the trial transcript reprinted herein as Appendix F.)

(See page 480 of the trial transcript:)

"MR. RIVERS: Objection.

THE COURT: No, no, don't keep on objecting.

MR. RIVERS: I excepted. Now I'm objecting.

THE COURT: That's enough. I ruled on that. There is going to be admitted in evidence. You've got your protection, whatever it is. We can't take that kind of time. Proceed."

At the trial, the government further failed to meet its burden of proof with respect to each and every count in the indictment. The envelopes used to sendout mailers to particular customers were used as proof to show mailers sent to other customers, having no connection thereto. Since each count in an indictment must stand or fall on the strength of its own allegation and cannot be aided by recitals in, or interences to be drawn from other counts in the indictment, (U.S. v APEX DISTRIBUTING CO., 148 F Supp. 432), Petitioner was denied the right to a fair trial. The District Court's allowance of inadequate evidence to support all fifty counts of the indictment, when such evidence related only to some counts of the indictment, was detrimental to Petitioner and denied him of a fair trial. The Court

of Appeals in affirming the conviction acquiesced in this procedure.

That as a result of the Court's rulings and admittance of the defective evidence, Petitioner was convicted in the United States District Court on all fifty counts of the indictment.

On September 19, 1975, the Judgment on Conviction was entered in the District Court. (Judgment reprinted here as Appendix G).

The Petitioner appealed to the United States Court of Appeals for the Second Circuit, that Court affirming the judgment of conviction in an Order dated and entered January 7, 1976.

The Court of Appeals decision is in conflict with the holdings of all other Court of Appeals who have considered the same or similar matter.

REASONS FOR GRANTING THIS WRIT

(1) The Court of Appeals, Second Circuit, by affirming Petitioner's conviction, rendered a decision in conflict with other Circuit Court of Appeals as to the manner in which Section 1341, Title 18 U.S.C is to be conformed to. Further, an important but troublesome question has arisen among the various circuits of what constitutes "intent" within the meaning of the Section 1341. That section reads:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises....for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized deposity for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it

is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years or both."

The various Court of Appeals have held that "intent" to defraud is an essential element of mail fraud, the burden of extablishing such evidence to be borne by the government. UNITED STATES v. SPARROW, 470 F 2d 885 (10th Cir. 1972) cert. denied, 411 U.S. 936 (1972); UNITED STATES v. JONES, 425 F 2d 1048 (9th Cir. 1970) cert. denied 400 U.S. 823 and UNITED STATES v. SHIPP, 359 F 2d 185 (6th Cir. cert. denied 385 U.S. 903 (1966).

In U.S. v. SPARROW (supra), at page 889, the Court held:

"....The element of the offense are:
(1) A scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises, and
(2) Use of the United States mails to further the scheme....The first element must be supported by a showing of requisite wilful intent...."

In the case at bar, the government failed to prove this essential element of a "specific intent." The evidence showed that the Petitioner, a businessman, together with his partners, embarked upon a business plan to process films at a low price of $9.95 (although a value of $22.10) to interested consumers.

The Petitioner was at all times willing to comply with the offer upon acceptance by the customers. Those consumers who did not want to accept the offer received refunds or at a later time the Petitioner and his company agreed to process the films.

The issue of what is required to meet the element of intent has varied among the numerous Circuits.

In U.S. v. REGENT OFFICE SUPPLY CO., 421 F 2d 1174 (2d Cir 1970), the Court

noted that the burden is on the prosecution to show not only an intent to deceive, but that some actual injury or harm is contemplated by the defendant. The Court stated that even if an intent to deceive and induce may have been shown, "this does not, without more constitute the 'fraudulent intent' required by the statute."

In BASS v. U.S., 409 F 2d 179 (5th Cir. 1969) cert. denied 396 US 863, the Court noted:

> "In order to establish the element of fraud under the federal mail statute.... There must be a scheme to defraud, representations known by defendants to be false and some person must have been defrauded." Citing, U.S. v. RABINOWITZ, 327 F 2d 62 (6th Cir 1964)

The Court further noted that if proof was lacking that the defendants expected to get "something for nothing", Citing HARRISON v. U.S., 200 F 662 (6th Cir. 1912),

> "....or that they intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendant's falsehood."

At page 1179:

> "....solicitations of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain do not constitute a scheme to defraud."

In the case at bar, there was no false representations made "directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain." The Petitioner made an offer to which dissatisfied consumers could refuse to accept. Those whose accounts were charged had the opportunity to have a refund, or in the alternative to have the film processed. These circumstances are inconsistent with the "intent" required by the statute. The Court's attention is referred to the con-

tents of a letter from the FOTO FACTORY, INC. to its customers:

> "Dear Customer:
>
> Recently you may have received a 'special introductory offer' of prepaid film-processing envelopes valued at $22.10, which would cost you $9.95.
>
> We have discovered an error in our computer printout since mailing the offer to you. As a result of that error, the offer was incorrectly mailed to some customers who had not requested it, and charges were processed to their Master Charge or Bank Americard accounts
>
> If you are unable to use these items, we would appreciate the return of the merchandise. Upon receipt of this merchandise and if your account was among those inadvertently charged we will issue a credit to your account.
>
> However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter. Please list below your name, address and credit card account number in the space provided below. A self addressed envelope is enclosed for your convenience.
>
> Very truly yours,
>
> FOTO FACTORY"

In HARRISON v. UNITED STATES, 200 F 662, 670 (6th Cir. 1912), where literature analogous to the case at bar, stated that refunds would be given to dissatisfied customers who purchased vacuum cleaners, it was held:

> "The promise to refund the purchaser's money if made in good faith and taken in connection with the literature here used could leave no room for the conclusion that the scheme upon the whole was one of defraud."

This clearly negates any element of intent required by the statute. In spite of all of the evidence, the Court of Appeals affirmed the conviction of the District Court, in effect rendering a decision totally in conflict with all other Circuits.

This Court has had numerous opportunities to clarify the meaning of intent and all necessary elements constituting the crime of mail fraud under Section 1341,

18 U.S.C. and has declined to do so by its various denials for Writs of Certiorari.

The proper resolution of this question left open has great significance, not only to this defendant, but other businessmen who, because of bad business judgment, find themselves involved in a criminal prosecution.

In UNITED STATES v. MAZE, 414 U.S. 395, this Court after granting certiorari, determined the issue before it pertaining to the second element of the mail fraud statute, namely what constituted "mailing" to carry out the execution of the fraud. This Court did not and has not specifically clarified the issue of "intent" pertaining to the first element of the statute, Section 1341.

This disagreement as to what constitutes the "specific intent" has resulted in a considerable amount of litigation and variation of interpretations by the lower Courts.

In addition, the decision by the Court of Appeals in affirming the Petitioner's conviction is in conflict with the decisions of other Court of Appeals on the same matter.

A resolution of this matter by this Court will clarify the meaning of the statute and alleviate not only the enormous amounts of lower Court time being taken to resolve these issues, but will save this Court's time in evaluating the numerous Petitions for Writs of Certiorari on the same issue.

(II) A further question that is squarely presented by the facts of this case is the exact question that this Court noted in U.S. v. LANZA, 260 U.S. 377 (1922), but more recently expressed some regret in

PETITE v. U.S., 361 U.S. 529 (1960.)

In the LANZA case, this Court held that both State and Federal Government could prosecute a defendant for the same crime. This decision in effect stressed the importance of federal-state relationship over and above the interest of the indivual to be twice prosecuted and punished for the same crime.

Today, with the emphasis on individual rights promulgated by this Court in other areas of constitutional protection, a reconsideration by this Court of the concept of "double jeopardy" is imperative.

This Court has authority granted to it under the Constitution and more specifically the Fifth Amendment thereof:

> "....nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;....nor be deprived of life, liberty or property, without due process of law."

In PETITE v. U.S., (supra) and MARAKAR v. U.S., 370 U.S. 723 (1962), this Court acquiesced in the belief that the "double jeopardy" concept should be applicable to federal-state successive prosecutions. In doing so, two convictions were vacated on the ground

> "that it is the general policy of the federal government, that several offenses arising out of a single transaction should not be made the basis of multiple prosecution in fairness to the defendant."

In U.S. v. CANDALARIA, 131 F. Supp. 797 (S.D. Cal. 1955), the Court squarely faced the issues and noted:

> "once acquitted or convicted of a crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment."

As early as 1820, this Court has held that prosecutions in the Courts of another foreign nation would be a bar to prosecuting the same defendant in a United States Federal Court. UNITED STATES v. FURLONG, 18 U.S. (5 Wheat) 184 (1820). To say that a United States citizen who has been tried in a foreign nation will not be tried in a United States Federal Court, but that a defendant who has been tried in a United States State Court, will be also tried in Federal Court for the same crime, in effect creates a situation which imposes a burden upon some, but not all citizens of the United States who are similarly situated, in contravention of the spirit and letter of the United States Constitution, and more particularly, the Fifth Amendment; nor shall any person "be deprived of life, liberty, or property, without due process of law."

Although this Court has noted that the basis of its passed decisions, LANZA (supra), BARTKAS v. ILLINOIS, 359 U.S. 121 (1959) and ABBATE v. U.S., 359 U.S. 187 (1959) was to continue the federal-state sovereignty rule, it has nevertheless, acknowledged that such prosecutions violate the spirit of our American institution.

Econony of money, health, time and "psychological security" are important considerations to be given the individual citizen, who are a whole comprising the State. A rule of law which separates the People of the fifty states, from the federal whole, is tantamount to the idea that "one nation will not enforce the criminal or penal sanctions of another." While this is justified under a system of international law, where sovereignty of nation is paramount, it is less justified under a system where all citizens are from one nation. To interpret the Fifth Amendment Double Jeopardy Clause

as excluding federal-state successive prosecutions, sets aside the citizens of the fifty states apart from the United States.

The petitioner herein, has been forced to defend himself not only under the federal "mail fraud" statute but also a state statute charging grand larceny and forgery, all arising from the exact set of facts and circumstances.

In light of these important considerations, this Court should reconsider the critical policy issues and deprivation of substantial individual rights, that underlie the threat of successive federal-state prosecutions.

III. In the event this petition is granted, the petitioner reserves the right to argue four further questions of importance to petitioner.

i.e, 1. Whether Sections 1341 and 1342 of Title 18 U.S.C. requires the government to establish a defendant's guilt to each and every individual count of the indictment.

2. Whether under these Sections and the Federal Rules of Civil Procedure, a denial of a motion for discovery constitutes prejudicial error and thus violates the defendant's constitutional right to a fair trial.

3. What constitutes admissible evidence for the purpose of establishing "mailing" as a requisite element of the crim of mail fraud.

4. Whether the defendant was given his constitutional right to a fair trial where, the lower court judge has so far departed from the accepted and usual course of judicial rulings and proceedings during the course of trial and the Court of Appeals has by its affirmance approved of such conduct.

CONCLUSION

For the reasons stated herein, this Court should grant petitioner's request for a Writ of Certiorari and entertain briefs and arguements on the merits.

APPENDIX

A

UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

APPEAL FROM THE UNITED STATES COURT OF APPEALS

Argued: January 7, 1976 Decided: January 7, 1976

Before : Hon. William Timbers
Hon. Ellsworth Van Graafeiland
Hon. Thomas J. Meskill

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee

APPENDIX A

UNITED STATES OF AMERICA,

Appellee,

v.

[redacted]

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court be and it hereby is affirmed. The mandate shall issue forthwith.

APPENDIX

B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

ORDER OF JUDGMENT

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee

APPENDIX B

24

United States District Court for

M'FILMED

DOMINICK SEMINARA — DOCKET NO. 74 CR 765

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 9 DAY 19 YEAR 1975

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Robert Rivers, Esq. (Name of counsel)

FILED

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

SEP 1 1975

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. counts 1 to 50 incl. INDICTMENT FILED PLEA

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C.Secs.1341 & 2, in that from on or about Sept. 21, 1973 and Oct. 25, 1973, the defendant with another, did unlawfully, wilfully & knowingly devise a scheme and artifice to defraud approximately 12,000 Bank Americard and Master Charge credit card holders throughout the U.S. as well as the Chase Manhattan Bank, N.A., the National Bank of North America and the First National City Bank and to obtain approximately $120,000 from said banks by means of false and fraudulent pretenses, representations and promises

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

On his conviction of guilty to counts 1 to 50 incl., of the Indictment, a sentence of three(3) years is imposed on each of counts 1 through 45 and pursuant to T-18, U.S.C. Sec. 3651, defendant shall be confined for a period of five(5) months, execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of two (2) years and seven (7) months to commence at the end of the prison term. The sentences are to run concurrently for a period of five(5) months imprisonment and two(2) years and seven (7) months probation, but consecutively to defendant's present State sentence. Also imposed on each of counts 46 through 50 is a fine of $500000 totalling $2,500.00. Execution of sentence is stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

*** The Court recommends incarceration at either Lexington, Kentucky or the Metropolitan Correctional Center.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

John R. Bartels

Date 9/19/75

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APPENDIX

C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

INDICTMENT

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee

APPENDIX C

EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

STEPHEN LENT and
DOMINICK SEMINARA,

Defendants.

- - - - - - - - - - - - - - - - - X

Cr. No. _____
(T. 19 U.S.C. [illegible]
§2.

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTY

1. During all times material herein, Foto Factory Ltd. was a corporation duly organized and existing under the laws of the State of Delaware and was engaged in the business of processing or developing photographic film at 240 Maple Avenue, Rockville Centre, New York.

2. During all times material herein, the defendant Stephen Lent, did serve as President and was a director and stockholder of Foto Factory Ltd.

3. During all times material herein, the defendant Dominick Seminara, did serve as Treasurer and was a director and stockholder of Foto Factory Ltd.

4. On or about and between September 15, 1973, and October 30, 1973, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent did unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud approximately 12,000 BankAmericard and MasterCharge credit card holders throughout the United States, as well as the Chase Manhattan Bank N.A., the National Bank of North America and the First National City Bank, and to obtain approximately $120,000 from said banks by means

of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

5. It was part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and sent through the mail, envelopes for film processing (designated "Prepaid Processing Mailer") to persons whom they knew to be BankAmericard and MasterCharge credit card holders without any prior knowledge or consent of the credit card holders.

6. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and included with the "Prepaid Processing Mailer[s]", a written statement setting forth the following representation:

MONEY BACK GUARANTEE

Enclosed is your assortment of prepaid Foto Factory mailers. One for 12 exposure color film, 2 for 20 exposure color film and one for 20 exposure slide film or Super 8 movie film.

When you are ready to develop your film, simply fill out name and address and enclose film - SEND NO MONEY - these are prepaid mailers.

We are certain you will enjoy dealing direct with the Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10.

7. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently omit and conceal from the written statement, quoted in paragraph 6, the fact that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the "Prepaid Processing Mailer[s]".

8. It was a further part of the scheme and artifice to defraud that the defendants

did knowingly and fraudulently cause credit card sales slips, each in the sum of $9.95, to be prepared, deposited and credited to the bank accounts of Foto Factory Ltd. maintained at Chase Manhattan Bank N.A., National Bank of North America and First National City Bank.

9. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause the withdrawal of all but a nominal sum of monies from the aforesaid bank accounts of Foto Factory Ltd., on a daily basis.

10. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently give, and cause to be given, a false and misleading explanation to credit card holders who inquired about the reason their accounts had been charged $9.95, in that the credit card holders were told that their accounts had been mistakenly charged as the result of a "computer error".

11. On or about the dates hereinafter set forth, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did unlawfully, wilfully and knowingly place and cause to be placed in post offices and authorized depositories for mail matter, the aforesaid "Prepaid Processing Mailer[s]" and accompanying written statements, to be sent and delivered by the United States Postal Service, in violation of Title 18, United States Code, Sections 1341 and 2, as hereinafter set forth in Counts One through Fifty.

COUNT	DATE	ADDRESSEE
1	September 21, 1973	David Sandler 24 Academy Circle Oakland, N.J. 07436

COUNT	DATE	ADDRESSEE
2	September 28, 1973	Lawrence H. Tomlinson 20801 Olympian Way Olympia Fields, Ill. 60461
3	September 30, 1973	Edward R. Dearnley 23131 Port St. Clair Shores, Mich. 48082
4	September 30, 1973	James E. Esposito The English Village Bldg. 4 Apt. A5 North Wales, Pa. 19454
5	September 30, 1973	Ann Marie Redente 90 Colchester Dr. Plymouth, Mass. 02063
6	October 1, 1973	Leon Goodman 75 Lenox Road E.4 Brooklyn, New York 11226
7	October 1, 1973	E. M. Robertson Newton, Pa. 18940
8	October 2, 1973	Mrs. Arthur G. Cohler 1874 Barone Rd. Palm Springs, Calif. 92262
9	October 2, 1973	Seymour Johnson, Jr. 1216 Princeton St. Tacoma, Wash. 98466
10	October 2, 1973	Gary Vosburg Box 469 Ticonderoga, N.Y. 12883
11	October 4, 1973	Julius Pines 7E Crescent Rd. Greenbelt, Md. 20770
12	October 5, 1973	Wendel B. Boggs 694 N. King St. Xenia, Ohio 45385
13	October 5, 1973	Leslie J. Kriss 35 Jerome Avenue Hicksville, N.Y. 11801
14	October 5, 1974	H. Metzger 2595 Standford Boulder, Colo. 80302
15	Ocotber 5, 1973	Joseph Stevenson 3522 Kentucky Avenue Baltimore, Maryland 21213
16	October 9, 1973	Marvin C. Chaiken 87 Ocean House Road Cape Elizabeth, Maine 09002
17	October 9, 1973	Herman Chasid 1600 G. North Main [illegible]

COUNT	DATE	ADDRESSEE
19	October 10, 1973	Clayton Green c/o Carolyn Green R.F.D. West Kingston Rhode Island, 02892
20	October 10, 1973	Charles Lazare 439 Nancy Dr. Baton Rouge, La. 70815
21	October 11, 1973	S. D. Kletzien 299 Branch Brook Dr. Belleville, N.J. 07109
22	October 11, 1973	Bernard Tepper 299 Bennett Ave., Apt. 3C New York, N.Y. 10040
23	October 11, 1973	Donald Tom 181 Waverly Place - 1 New York, N.Y. 10014
24	October 12, 1973	J.L. Fry 3178 Wendover Dr. Toledo, Ohio 43606
25	October 12, 1973	Sam Warsoff 19 Mirror Lake Rd. Spring Valley, N.Y. 10977
26	October 15, 1973	Andrew Balducci 36 Glen Brook Dr. Prospect Hgts, Ill. 60070
27	October 16, 1973	Ralph Kraft Box 63 Jamestown, N.D. 58401
28	October 16, 1973	Clarence Lewis 6631 W. 83rd St. Los Angeles, Calif. 90045
29	October 17, 1973	Henry Adams 789 Clifton Road Bethel Park, Pa. 15102
30	October 17, 1973	Herbert L. Corey 11 Amherst Drive Massapequa, N.Y. 11758
31	October 17, 1973	Peter Parafin 24534 Greenbrier E. Detroit, Mich. 48021
32	October 18, 1973	M. G. Dalgleish 2600 Pine View Dr. Fortuna, Calif. 95540
33	October 18, 1973	Wm. Lemley 4426 N.E. 17th St. Renton, Wash. 98055
34	October 18, 1973	Anthony [illegible]

36	October 18, 1973	Charles Sheehan 287 High Street Middletown, Conn. 06457
37	October 19, 1973	Nora Hackett 45 Elm St. 4B Quincy, Ma. 02169
38	October 19, 1973	Jules N. Stern 2182 Batchelder St. Brooklyn, N.Y. 11229
39	October 19, 1973	R. J. Stewart P.O. Box 185 Long Beach Br. Beach Haven, N.J. 08008
40	October 19, 1973	J.B. Thurman 2024 So. 18 St. New Castle, Ind. 47362
41	October 19, 1973	S. Vanov 3790 Stoughton Rd. Collegeville, Pa. 19426
42	October 19, 1973	J. Vestal 3519 Cornell Pl. Cincinnati, Ohio 45220
43	October 22, 1973	Frances Goller 54-40 Little Neck Pkwy. Little Neck, N.Y. 11362
44	October 23, 1973	Juit M. Divet P.O. Box 1039 Tacoma, Wash. 98401
45	October 24, 1973	Fred L. Grant 4615 Hunt Rd. Cincinnati, Ohio
46	October 24, 1973	W. Brad Schlegel 821 S. Broad St. Lansdale, Pa. 19446
47	October 25, 1973	Wendell B. Boggs 694 N. King St. Xenia, Ohio 45385
48	October 25, 1973	Wm. J. Brodsley 1820 Redondela Dr. San Pedro, Calif. 90732
49	October 25, 1973	Bruce J. Miller 13 Doe Lane Malverne, Pa. 19355
50	October 25, 1973	John Reeves 3264 Clifton Ct. Palo Alto, Calif. 94303

A TRUE BILL.

FOREMAN.

UNITED STATES ATTORNEY

APPENDIX

D

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

LETTER

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee,

APPENDIX D

NOVEMBER 12, 1973

FOTO [illegible]CTORY LTD
2[illegible] LE AVENUE
ROCKVILLE CENTRE N Y 11570

DEAR CUSTOMER:

RECENTLY YOU MAY HAVE RECEIVED A SPECIAL INTRODUCTORY OFFER OF PREPAID FILM-PROCESSING ENVELOPES VALUED AT $[illegible] WHICH WOULD COST YOU $9.[illegible]5

WE HAVE DISCOVERED AN ERROR IN OUR COMPUTER PRINTOUT SINCE MAILING THE OFFER TO YOU. AS A RESULT OF THAT ERROR, THE OFFER WAS INCORRECTLY MAILED TO SOME CUSTOMERS WHO HAD NOT REQUESTED IT, AND CHARGES WERE PROCESSED TO THEIR MASTER CHARGE OR BANK-AMERICARD ACCOUNTS

IF YOU ARE UNABLE TO USE THESE ITEMS, WE WOULD APPRECIATE THE RETURN OF THE MERCHANDISE. UPON RECEIPT OF THIS MERCHANDISE AND IF YOUR ACCOUNT HAS [illegible] WE WILL ISSUE A CREDIT TO YOUR ACCOUNT.

HOWEVER, IF YOU ARE [illegible] PROCESSED [illegible] PLEASE [illegible] IN THE SPACE PROVIDED BELOW. A SELF [illegible] ENCLOSED FOR YOUR CONVENIENCE.

[illegible]

BEST COPY AVAILABLE

APPENDIX

E

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

TRIAL TRANSCRIPT
(pages 36-44)

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee

APPENDIX E

THE COURT: We come back to what's in the cabinets. You were prepared to go to trial without that material?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: You still are?

MR. FRIEDMAN: Yes, your Honor. I have a copy of a letter I sent to Mr. Pincus I would like the Court to see, on February 6, 1973, and in it--he asks for discovery regarding his client, and the letter responds to that specifically, and a copy of that was sent to Mr. Rivers.

(A document is handed to the Court by Mr. Friedman.)

THE COURT: Are these documents that you refer to that the prosecutor of Nassau County had taken from the defendants? Is that right?

MR. FRIEDMAN: I believe taken from their premises.

THE COURT: From the corporation.

MR. FRIEDMAN: Corporation's premises.

THE COURT: Of course, I have to know the nature of the case a little more in detail to be able to say anything about it. They are in the nature of sales slips that the officers of this corporation made out.

MR. FRIEDMAN: Yes.

THE COURT: No exculpatory papers or documents?

MR. FRIEDMAN: I don't believe under Brady, your Honor.

THE COURT: That's what I'm interested in, any Brady material there that you have.

MR. FRIEDMAN: Just the $9.95 charge slips, Honor, in connection with this $9.95 charge which is the basis of this indictment.

THE COURT: $9.95?

I'm not familiar with the numbers as you are. What do you mean by $9.95.

MR. FRIEDMAN: It's an amount of money. The indictment alleges the defendant carried out a fraudulent scheme in which they billed previous Foto Factory customers on their Master Charge, in which they billed $9.95.

THE COURT: Tell me something about $9.95.

MR. FRIEDMAN: These are the copies that are retained by Foto Factory when they were preparing these unauthorized billings, the Government alleges.

THE COURT: What do you have to say? We're going to go to trial, Mr. Rivers.

MR. RIVERS: Specifically, you indicate I'm

entitled to any evidence illegally seized. You say that back in January, 1974.

MR. FRIEDMAN: No motion was made, your Honor.

MR. RIVERS: Specifically, the Court directed the United States Attorney to turn these over.

THE COURT: He didn't seize them. He didn't have it.

MR. RIVERS: He has them now.

MR. FRIEDMAN: Such a motion would be entertained at the time of trial. Isn't that the practice of this court?

MR. RIVERS: He has them now. Based on the fact he served this on me, he doesn't indicate it's in his possession at all times. He says, "The enclosed letter from Dominick Seminara to the Federal Trade Commission has recently come to my attention." Recently come to his attention?

He either had them or didn't have them.

THE COURT: He can have them recently. Did you have them in January?

MR. FRIEDMAN: Mr. Rivers, would you like to answer for me?

MR. RIVERS: You had them in January.

THE COURT: You had them too, Mr. Rivers.

MR. RIVERS: No, I did not.

THE COURT: You had the statements; your client had the statements, unless you closed shop you did. Did you close the business up?

Is this company still operating?

MR. RIVERS: It's not operating.

THE COURT: When was it closed?

MR. PINCUS: I think closed before the first of the year.

THE COURT: And the prosecutor obtained documents. Well, if he states he does have no exculpatory statements in there and you have had a chance to view it.

MR. FRIEDMAN: Yes.

THE COURT: We'll proceed to trial and let you look at it during the trial and before. A lot of this is plain, unadulterated evidence which you wouldn't be entitled to see it.

MR. FRIEDMAN: As a matter of courtesy, that letter was sent to the defendant, not as a matter of law.

MR. RIVERS: The Court directed it.

THE COURT: What's my phraseology?

(A transcript is handed to the Court.)

THE COURT: That's January and this is June.

There's quite a number of months. That's why I say we must have this trial.

I don't know what he means by "evidence illegally received." You had your bill of particulars. A bill of particulars is one thing and evidence is another.

MR. RIVERS: On the eve of trial.

MR. FRIEDMAN: He never asked for a bill of particulars.

THE COURT: What particulars do you want?

MR. RIVERS: As I understand it, there are certain admissions to be used here, admissions made to consumer groups, the Bankruptcy Court.

THE COURT: What admissions? Made by your client?

MR. RIVERS: Admissions made on tape, stenographic minutes under oath without the benefit of an attorney. He knows about these things.

THE COURT: Do you know what he's talking about?

MR. FRIEDMAN: Your Honor, there was testimony, other testimony before the Attorney General, Consumer Affairs Department by Mr. Seminara. I have a copy of those minutes which I have turned over, and I'm going to give him copies now.

MR. RIVERS: Now?

THE COURT: You could have gotten copies.

MR. RIVERS: I asked for those copies.

THE COURT: You could get them from the Attorney General, can't you?

MR. RIVERS: We couldn't get them.

THE COURT: What attorney general are you talking about, the state?

MR. RIVERS: State.

THE COURT: He doesn't have control over the Attorney General of the state.

MR. FRIEDMAN: As a matter of courtesy, I'm turning them over.

MR. RIVERS: On the eve of trial.

THE COURT: No, the day of trial.

MR. RIVERS: The other thing to keep the record straight, we have what purports to be a stipulation--

THE COURT: Who did that?

MR. RIVERS: Mr. Friedman.

THE COURT: I never saw it.

(A document is handed to the Court by Mr. Rivers.)

MR. RIVERS: It's the actual heart of the case. He wants us to stipulate.

THE COURT: You don't have to stipulate.

MR. FRIEDMAN: We're having calling a lot of witnesses. I would like the record to indicate I turned over to Mr. Pincus and Mr. Rivers Mr. Seminara's testimony before the Attorney General, Consumers Affairs Department. I'm giving Mr. Rivers a copy of the minutes of Mr. Rivers' client's plea in the state court.

THE COURT: Your client pleaded too, did he?

MR. RIVERS: Yes. I didn't represent him in state court.

THE COURT: What do you call that plea?

MR.PINCUS: Cerrano plea. Nolo contendere.

THE COURT: I don't identify it in that matter.

MR. RIVERS: Is it the Court's position I'm going to be ready for trial and go through the material?

THE COURT: We'll impanel the jury and we'll have to start, Mr. Rivers, there's no question about it. I can't stop it because this is not the state court where you have a lot of cases ready. If one isn't tried a judge can try another. That used to be so in the master calendar case. With the assignment system, the defendant gets the benefit which he wouldn't have in the master calendar case.

which indicates a day certain which obligates the court to try it on that day. That would leave the Court and the staff dangling and it also has prevented others who wish that time period for the trial of this case from proceeding. It just creates a big void, and it interferes with the administration of justice and also as far as I see, even the fair and equitable treatment of the defendants.

It has to be tried unless there is an emergency of some kind. Very seldom that it's that situation present. Indeed, I have no trouble. These cases go along with many of these other judges, just on that kind of schedule. It has to be, or the assignment system wouldn't work. Therefore the trial has to be. Of course, sometimes a fugitive, a person, doesn't appear. That is, a client. Then we have to have a bench warrant for him, and the judge, of course, is then deprived of an opportunity to use his available time which he set aside for the case.

Lawyers have no right to ask for that kind of adjournment, and we can't tolerate it. Not because we want to be tough, but because we have an obligation to try cases and to keep the calendar moving, which is already clogging up with far too

many cases. We have to try this case, Mr. Rivers. We'll give you an opportunity and we may stop earlier one day, to give you an opportunity to look at this metal cabinet.

As I see it, these documents only came into Mr. Friedman's possession just on Friday, was it?

MR. FRIEDMAN: Friday, your Honor.

THE COURT: As far as he's concerned, he's looked at them and they're simply evidence and no exculpatory statements; however, in the course of the examination if you find any exculpatory statements, we'll give you an opportunity to review it before the end of the trial and you can use it.

MR. RIVERS: I point out to the Court this is tantamount to denying the defendant a fair trial.

THE COURT: You have the right to put that on the record and other statements.

MR. RIVERS: I'm not prepared for trial.

THE COURT: There's no reason you shouldn't have been. We had this case going since December and it's a mail fraud case, and the indictment is very full and gives, I think, the particulars in itself, and there's no reason why this case, like any other cases, and many of them should not shoot

APPENDIX

F

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

TRANSCRIPT OF TRIAL
(pages 477-480)

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
Unites States Attorney
Attorney for Appellee

APPENDIX F

VOIR DIRE EXAMINATION

BY MR. RIVERS:

Q Mr. Schroeder, can you say within a degree of definiteness before this jury you prepared each and every one of these 33 envelopes?

A They look like the envelopes that I prepared.

Q Are they exactly the envelopes you prepared?

A That, I can't be sure of.

Q As a matter of fact, there were other persons employed in the shipping unit other than yourself? Is that right?

A Yes.

Q They had the job of preparing envelopes, also; is that correct?

A Yes.

Q In the interim, between Thursday and today, did you have occasion to spend some time in Mr. Friedman's office with Mrs. Schwartz and Mr. Friedman?

A Yes, I did.

Q At that time did you go over the facts that you would discuss from the stand, the similarity or apparent similarity between the labels and these envelopes that you allegedly prepared?

A Yes.

Q Did you go over the fact that you would discuss from the stand the similarity between the envelopes addressed; that is, as to the method you address and the ones you allegedly prepared?

A Yes.

Q Did you go over the fact that you would testify from the stand with regard to the Scotchtape used from the envelopes that you allegedly prepared and those which appear on these 33 exhibits?

A Yes.

Q So that your testimony now is a result of some discussion had with Mr. Friedman and Mrs. Schwartz during the period from Thursday to today?

A Yes.

Q Relative to these envelopes?

A Yes.

Q You cannot say with any degree of definiteness as to whether or not these were the exact envelopes prepared by you; is that correct?

A Yes.

MR. RIVERS: Objection.

MR. PINCUS: I join in the objection, your Honor.

THE COURT: Let me look at them.

(Said exhibits handed to the Court by Mr. Rivers.)

THE COURT: The question this morning is your testimony, your own testimony with respect to these new envelopes. What is it, 13, 19, et cetera? That's your --

MR. RIVERS: Might I respectfully except to the Court's question?

THE COURT: Overruled. That's your testimony; isn't it?

THE WITNESS: Yes.

THE COURT: Is it any testimony suggested, Mr. Friedman?

THE WITNESS: No, he asked me.

THE COURT: That's your testimony?

THE WITNESS: (No response.)

THE COURT: All these envelopes do have Foto-Mat on them or Foto-Factory, right?

THE WITNESS: Yes.

MR. RIVERS: I respectfully except.

THE COURT: Admitted into evidence.

Next.

MR. RIVERS: May I, for the record, respectfully except.

MR. PINCUS: Exception on my part.

THE COURT: Proceed.

THE CLERK: Government's Exhibit 3, 6, 7, 10, 11, 12, 14, 16, 18, 19, 20-A, 20-B, 21, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 39, 40, 41, 45, 47, 48, and 50, envelopes, marked in Evidence.)

(So marked.)

MR. RIVERS: Objection.

THE COURT: No, no, don't keep on objecting.

MR. RIVERS: I excepted. Now, I'm objecting.

THE COURT: That's enough. I ruled on that. There is going to be admitted into evidence. You've got your protection, whatever it is. We can't take that kind of time. Proceed.

DIRECT EXAMINATION

BY MR. FRIEDMAN (Continued):

Q On Friday, did you testify that you had prepared these envelopes as well as several others from the last week of September to the last week of 1973?

THE COURT: Well, he testified definitely, as to certain ones. As to others, his testimony was that it appeared to be the same. There is a difference.

Q When you were preparing the envelopes in connection with the 9.95 charges, were you preparing them on a daily basis?

APPENDIX

G

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT

APPEAL NO. 74 CR 765

UNITED STATES OF AMERICA,

Appellee,

-against-

DOMINICK SEMINARA,

Appellant,

JUDGMENT OF CONVICTION

ROBERT RIVERS, ESQ.
Attorney for Appellant

HON. DAVID G. TRAGER
United States Attorney
Attorney for Appellee

APPENDIX G

United States of America vs. 24 **United States District Court**

DOMINICK SERGIARA

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — 9 19 1975

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Robert Rivers, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FILED
SEP 1 - 1975

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. counts 1 to 50 incl.

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C.Secs.1341 & 2, in that from on or about Sept. 21, 1973 and Oct. 25, 1973, the defendant with another, did unlawfully, wilfully & knowingly devise a scheme and artifice to defraud approximately 12,000 Bank Americard and Master Charge credit card holders throughout the U.S. as well as the Chase Manhattan Bank, N.A., the National Bank of North America and the First National City Bank and to obtain approximately $120,000 from said banks by means of false and fraudulent pretenses, representations and promises

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

On his conviction of guilty to counts 1 to 50 incl., of the Indictment, a sentence of three(3) years is imposed on each of counts 1 through 45 and pursuant to T-18, U.S.C. Sec. 3651, defendant shall be confined for a period of five(5) months, execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of two (2) years and seven (7) months to commence at the end of the prison term. The sentences are to run concurrently for a period of five(5) months imprisonment and two(2) years and seven (7) months probation, but consecutively to defendant's present State sentence. Also imposed on each of counts 46 through 50 is a fine of $500.00 totalling $2,500.00. Execution of sentence is stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

*** The Court recommends incarceration at either Lexington, Kentucky or the Metropolitan Correctional Center.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signature of U.S. District Judge: John R. Bartels

Date 9/19/75

BEST COPY AVAILABLE

No. 75-1152

In the Supreme Court of the United States

OCTOBER TERM, 1975

DOMINICK SEMINARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1152

DOMINICK SEMINARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence failed to establish an intent to defraud and that a prior state prosecution for grand larceny and forgery barred his federal prosecution for mail fraud.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of 50 counts of mail fraud in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of three years' imprisonment on counts 1 through 45; the court specified, however, that petitioner be confined for a period of five months and that execution of the remainder of the sentence be suspended in favor of probation. Petitioner was also fined a total of $2,500 on counts 46 through 50. The court of appeals affirmed without opinion (Pet. App. A).[1]

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[1]The judgment of the court of appeals was entered on January 7, 1976. The petition for a writ of certiorari was filed on February 11, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence showed that petitioner participated in an extensive scheme whereby his mail-order photo developing company sent unsolicited "prepaid" mailers with a "money back guarantee" to persons throughout the country and at the same time, without the knowledge or approval of the recipients, charged their credit cards for the mailers and received payment for the charges from the relevant banks. Petitioner exercised continuous supervision over his employees in executing the scheme (Tr. 211-215, 352-354, 583-584), instructed them how to proceed (Tr. 199, 577), and formulated a response to be given in the event of complaints (Tr. 222-223, 404-405, 588, 1236-1237). The scheme yielded about $120,000 in six weeks.

1. Petitioner claims that the evidence failed to demonstrate any intent to defraud on his part, because he "made an offer [that] dissatisfied consumers could refuse to accept" (Pet. 29), he was "at all times willing to comply with the offer upon acceptance by the customers" (Pet. 27), and "[t]hose consumers who did not want to accept the offer received refunds or at a later time [he] and his company agreed to process the films" (*ibid.*). The essence of the fraud, however, was that recipients of the unsolicited mailers had their credit cards charged without their knowlege or approval. They were not told that they had to reject the "offer" to avoid credit card charges; indeed, by the time they received the mailers their accounts had already been charged. Moreover, it was not petitioner who provided the recipients with refunds but rather the banks that issued the credit cards. The banks were not advised by petitioner that the cards were unauthorized, and they were never reimbursed for the refunds by petitioner or his company (Tr. 669-672, 1038).

The evidence of fraudulent intent was, in sum, overwhelming.

2. Petitioner was initially indicted in December 1973 on state charges of grand larceny, forgery, criminal possession of forged instruments, and falsification of business records. These charges were based on the deposit of several fraudulent Master Charge sales slips in the photo company's account at a branch office of the First National City Bank.

A federal grand jury investigation was thereafter commenced, and petitioner was indicted on December 6, 1974, on 50 counts of mail fraud.

On December 31, 1974, more than a year after the original state indictment, the state grand jury returned a second indictment containing similar charges but based on several other deposits of fraudulent charge slips. On January 13, 1975, petitioner pleaded guilty in state court to a reduced charge of one count of grand larceny in the third degree (stealing property exceeding $250 in value).[2]

Prosecution under the 50-count federal indictment was commenced on June 24, 1975, and the jury returned its guilty verdict on July 14, 1975.

Thereafter, in August 1975, petitioner was sentenced in state court to an indeterminate term of up to three years' imprisonment.[3] In September 1975, petitioner was sentenced on the federal charges. That sentence was made to run consecutively to the prior sentence on the state charge.

Petitioner contends that, under double jeopardy principles, the federal prosecution was barred by the

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[2]Petitioner was permitted to enter an "*Alford* plea," which, under state law, did not constitute an admission of guilt.

[3]Petitioner's appeal from the state judgment is pending before the Appellate Division of the Supreme Court of New York.

prior state prosecution. He apparently recognizes that under the decisions of this Court "a federal prosecution is not barred by a prior state prosecution of the same person for the same acts." *Abbate* v. *United States*, 359 U.S. 187, 194; see also *United States* v. *Lanza*, 260 U.S. 377. Petitioner suggests, however, that those decisions should be reconsidered and overruled (Pet. 34, 37).

Like the petitioner in *Abbate*, who urged unsuccessfully that *Lanza* should be overruled, petitioner here advances "[n]o consideration or persuasive reason not presented to the Court in the prior cases * * * why we should depart from [the] firmly established principle" (359 U.S. at 195). Indeed, the federal prosecution here, which grew out of a nationwide mail fraud scheme, was much broader than the state prosecution, which related only to a small number of local manifestations of the nationwide fraud. Even if the federal prosecution can fairly be characterized in these circumstances as involving the same criminal acts as the state prosecution, this case, like *Abbate*, illustrates the "undesirable consequences" (359 U.S. at 195) that would follow from adoption of the rule sought by petitioner. Here, as in *Abbate*, "the defendants' acts impinge more seriously on a federal interest than on a state interest"; if this federal prosecution were barred by the much more limited state prosecution, "federal law enforcement must necessarily be hindered" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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